Appendix.

Revenue Acts.

The Revenue Act of 1921 contains the following:

"Sec. 202(a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that * * *

Sec. 202(a) (3) On the case of such property, acquired by bequest, devise or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition * * *."

The Revenue Acts of 1924 and 1926, in each case contain the following:

"Sec. 204(a) The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that * * *

Sec. 204(a) (5) If the property was acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition * * *."

The Revenue Act of 1928 contains the following:

"Sec. 113. Basis for Determining Gain or Loss.

Sec. 113(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that * * *

Sec. 113(a) (5) Property transmitted at death.—If personal property was acquired by specific bequest, or if real property was acquired by general or

specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer * * *."

The Revenue Act of 1932 contains the following:

"Sec. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

Sec. 113(a) Basis (unadjusted) of property.—The basis of property shall be the cost of such property; except that—

Sec. 113(a)(5) Property transmitted at death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer * * *."

The Revenue Acts of 1934, 1936, 1938 and 1939, in each case, contain the following:

"Sec. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

Sec. 113(a) Basis (unadjusted) of property.—The basis of property shall be the cost of such property; except that * * *

Sec. 113(a)(5) Property transmitted at death.—If the property was acquired by bequest, devise or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition * * *."

Treasury Regulations, etc.

Article 56 of Regulations 45 provided in part:

"In the case of property acquired by gift, bequest, devise or descent, the basis for computing gain or loss on a sale is the fair market price or value of the property at the time of acquisition or as of March 1, 1913, if acquired prior thereto."

In Cumulative Bulletin Number 3, July-December, 1920, page 50, the then Solicitor of Internal Revenue ruled that the then existing rule, as the basis for determining that gain or loss from a sale by a remainderman after the termination of a life estate was the value of the property upon the date when the remainder vested in possession, be overruled and the rule established that such basis should thereafter be not when possession or enjoyment vested in fact but when the right to possession vested although enjoyment might be postponed.

In the same Cumulative Bulletin, at page 53, appears the following Office Decision:

"Where in a bequest of property the remaindermen have only a contingent interest prior to the death of the life tenant, the basis for determining gain or loss from a sale of such property by the remaindermen is its value as of the date of death of the life tenant."

The foregoing Regulation to the effect that in the case of property acquired by gift, etc., the basis is the value at the time of acquisition, etc., was in substance adopted as a

part of the Revenue Act of 1921. General Counsel's Memorandum Number 10,260 is contained in Cumulative Bulletin XI-1, January-June, 1932, page 79, in which memorandum the following appears:

> "* * * Contingent beneficiaries or remaindermen are not regarded as having 'acquired' property under the Revenue Acts, and, consequently, in such cases 'distribution,' as well as acquisition, is necessarily contingent until substantial ownership vests, at which time distribution to them is automatically concluded. * * *"

In General Counsel's Memorandum, Cumulative Bulletin XIV-1, January-June, 1935, page 202, relating to the Revenue Act of 1928, the Treasury Department abandoned the standard of substantial ownership and ruled that "vesting of some recognized sort" fixed the time of acquisition.

In Treasury Regulations 86, Income Tax, Revenue Act of 1934, the following appears:

> "Under the law governing wills and the descent and distribution of the property of decedents, all titles to property acquired by bequest, devise, or inheritance relate back to the death of the decedent, even though the interest of him who takes the title was, at the date of death of the decedent, legal, equitable, vested, contingent, general, specific, residual, conditional, executory, or otherwise. Pursuant to this rule of law, section 113(a)(5) prescribes a single uniform basis rule applicable to all property passing from a decedent by will or under the law governing the descent and distribution of the property of decedents. Accordingly, the time of acquisition of such property is the death of the decedent, and its basis is the fair market value at the time of the decedent's death, regardless of the time when the taxpayer comes into possession and enjoyment of the property."

In Treasury Regulations 103, Income Tax, Internal Revenue Code (1940) the following appears:

> "* * * the basis of property acquired from a decedent by will or under the law governing the descent and distribution of the property of decedents is the fair market value at the time of such acquisition. Since, under the law governing wills and the distribution of the property of decedents, all titles to property acquired by bequest, devise, or inheritance relate back to the death of the decedent, even though the interest of him who takes the title was, at the date of death of the decedent, legal, equitable, vested, contingent, general, specific, residual, conditional, executory, or otherwise, the time of the acquisition of such property is the death of the decedent."

Senate Reports.

Senate Report No. 960, 70th Congress, 1st Session, page 26, contains the following:

> "SEC. 113.—BASIS FOR DETERMINING GAIN OR LOSS.—EXECUTOR'S SALE.
>
> The decision by the Court of Claims in *McKinney* v. *United States* has caused confusion in the existing law as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate. The House Bill in section 113(a)(5) provides that in such cases the basis shall be the fair market value of the property at the time of the death of the decedent. In the same section the House bill provides the same basis shall be used where the property is sold by the beneficiary.
>
> It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is im-

possible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's death can not properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living.

Accordingly, the committee has revised section 113(a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary."

Senate Report No. 558, 73rd Congress, 2nd Session, pp. 34 and 35 contains the following:

"Under section 113(a) (5) of the Revenue Act of 1932, the basis for determining gain or loss, for income-tax purposes, on the sale or other disposition of property transmitted at death is, in the following cases,

the fair market value thereof at the time of the death of the decedent:

(1) Where personal property was acquired by specific bequest;

(2) Where real property was acquired by general or specific devise, or by intestacy;

(3) Where the property, real or personal, was acquired by the decedent's estate from the deceased.

In all other cases, if the property was acquired by will or intestacy, the basis is the fair market value of the property at the time of distribution to the taxpayer.

Included within the phrase 'all other cases' is personal property acquired by general or residuary bequest. Thus, where a trustee acquires personal property by general bequest, the basis of the property on a sale by him, is the value at the time of distribution to him. The basis to the executor, in all cases, is the value of the property at the date of the decedent's death.

Oftentimes, the executor and trustee under a will are one and the same person. Thus, in the case of a general bequest of personal property, he is in a position to make use of one basis of valuation or the other according to which will most benefit the estate. The trustee, of course, may use a later basis than the executor, and where it is desired to sell personal property subject to a trust during the period of administration, the executor-trustee may determine whether it would be most advantageous to sell as executor or as trustee. Where the personal property has increased in value in the hands of the executor, under a general bequest, the property may be distributed to the trustee, who may use the higher basis in computing gain or loss on the sale, thereby diminishing the taxable increment and greatly reducing or entirely avoiding the income tax.

Section 113(a) (5) of the Revenue Act of 1932 is a reenactment of a similar provision contained in the 1928 act. The change in the 1928 act was made because there was some doubt as to the meaning of the term 'date of acquisition', which was the term used under the Revenue Act of 1926. Since the 1928 act was passed, the Supreme Court has defined 'the date of acquisition' to mean the date of death in the case of all property passing by bequest, devise, and inheritance, whether real or personal. (*Brewster* v. *Gage*, 280 U. S. 327.) Section 113(a) (5) of the House bill conforms to the language contained in the Revenue Act of 1926, so that a uniform basis rule may be required in the case of property passing at death, whether real or personal. The only change made by your committee to this paragraph of the House bill is to make it clear that if the property of the decedent is sold by the executor or other representative of the estate of the decedent, the basis for computing gain or loss from such sale is the fair market value at the date of death, which is the same basis adopted under the House bill when the property is sold by the beneficiary. The section also includes a provision relating to general powers of appointment exercised by will, which was explained in connection with section 113(a) (4)."

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 836

ELSIE VAN VRANKEN, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The question presented is as to the proper basis, under Section 113 (a) (5) of the Revenue Act of 1934, for determining gain or loss upon sales of securities which petitioner received from a testamentary trust. Section 113 (a) (5) provides that the basis for property "acquired by bequest, devise, or inheritance," shall be its value "at the time of such acquisition." Petitioner was the remainder beneficiary of the trust; the testator died in 1915 and the life tenant under the trust died in 1930. Petitioner contends that she "acquired" the prop-

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erty at the death of the life tenant and that its basis is its value on that date. The Government contends that she "acquired" the property upon the death of the testator, and that its basis is its value on that date.

Substantially the same question is before this Court in *Helvering* v. *Reynolds,* 114 F. (2d) 804 (C. C. A. 4th), certiorari granted, No. 684, this Term, and in *Cary* v. *Helvering,* and associated cases, 116 F. (2d) 800 (C. C. A. 2d), certiorari granted, Nos. 734–737, this Term.[1] Therefore, we do not oppose the granting of a writ in the present case, but suggest that the Court may wish to withhold action on the petition for certiorari in the present case pending disposition of the *Reynolds* and *Cary* cases.

Further, other related questions have already been argued before this Court in *Maguire* v. *Helvering,* No. 346, this Term, and *Helvering* v. *Gambrill,* and associated cases, Nos. 472–475, this Term, and it may be that the decisions in those cases will substantially dispose of the questions in the present case and in the *Reynolds* and *Cary* cases.

If the outcome of the present cases should depend, contrary to the Government's contention, upon whether the interests of petitioners under the

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[1] The same question is also presented by the petition for certiorari in *Augustus* v. *Helvering,* No. 819, this Term.

trust were "vested" or "contingent", we wish to reserve the right to contend that the interests were vested rather than contingent.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

MARCH 1941.

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